Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments

MB Docket No. 07-51

Reply to Reply Comments regarding whether abrogation of contracts constitutes a taking

Several recent comments and reply comments rely on inapplicable case law to suggest that any government decision that prohibits any action previously required by an existing contract constitutes a per se taking. In fact, the United States Supreme Court has concluded that the powers of the government are not diminished by contracts between other parties, finding in *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-08 (1935) that "[p]arties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them" and more recently that

> Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking.

[*Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223-24 (1986) (internal quotation marks and citations omitted)]. The cloaking of exclusivity in the form of a contract does not preclude the government from prohibiting exclusivity.

Advance/Newhouse Communications relies on *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16 (1977). However, in this case, the Supreme Court noted that it was applying a standard applicable only to cases in which the government "impairs the obligation of its own contract", not to cases involving contracts between private entities. This standard was intended to ensure that the government did not, for example, attempt to avoid repaying its debts by abrogating its own contractual obligations, which is clearly not the case here. It noted that "in reviewing economic and social regulation, however, courts properly defer" to the wisdom of the regulating authority. Additionally, it found that the government "must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from state regulation by making private contractual arrangements." In other words, in the very ruling cited by the Advance/Newhouse Communications, the Supreme Court found that the government "must" possess the power to prohibit exclusivity without concern for the resulting impairment of private exclusive contracts, lest providers use private contracts for the purpose of evading government prohibitions against exclusivity.

Charter Communications cites *Mid-American Waste Sys. v. City of Gary*, 49 F.3d 286, 289 (7th Cir. 1995), but admits in a footnote that this case involved the confiscation of a leasehold interest, in other words, the right of a leaseholder to use leased property. Merely allowing additional providers access to tenants would not vitiate the ability of the providers who currently hold exclusive contracts to continue to provide service. Their inability or unwillingness to provide service to persons who have a choice is their own failing, and not an inherent result of prohibiting exclusivity. However, allowing exclusive contracts would tend to diminish the right of leaseholders to use leased property, insofar as exclusive contracts destroy the right of the tenant

with a leasehold interest to obtain service from the provider of the tenant's choice within the tenant's leasehold interest. Under this theory, the case cited could be used by tenants to challenge individual exclusive contracts, even if the Federal Communications Commission does not abrogate them.

The Real Access alliance cites *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), which applies to space that the property owner has *not* chosen to lease, and deals with whether the property owner can be required to set aside a portion of that space for the use of another company, instead of using that space itself. This is fundamentally different from the current dispute, which deals property owners who chose to lease a portion of their property and the right of the leaseholder to select the provider of service for the property that the owner has already agreed not to use and to allow the leaseholder to use. In *FCC v. FLORIDA POWER CORP., 480 U.S. 245 (1987)*, the United States Supreme Court held that, once a property owner chooses to enter into a rental arrangement, the government can impose restrictions on the property owner for the benefit of the tenant, even if those restrictions would constitute a taking in the absence of the lease, and diminish the property owner's contractual rights. Because the tenant who is adversely affected by an exclusivity provisions has not consented to the contract containing the exclusivity provision, that tenant has an even greater right to relief than the tenants in *FCC v. FLORIDA POWER CORP., 480 U.S. 245 (1987)*, who were themselves consenting parties to the contract from which they sought relief.

In conclusion, as Advance/Newhouse Communications admits, the Federal Communications Commission should follow the standard adopted in *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16 (1977), which provides that, unless the government is a party to the contract, it may "adopt general regulatory measures without being concerned that private contracts will be impaired" and without paying compensation to the affected parties.